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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 724

SEABOARD MACHINERY CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Seaboard Machinery Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on October 14, 1959, a petition for rehearing having been denied on November 25, 1959.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Northern District of Florida, dated October 28, 1957, (R. 119-125; Appendix A infra, pp. 1a-5a) is reported at 156 F. Supp. 40. The opinion of the Court of Appeals in this case (R. 139-148; Appendix B infra, pp. 6a-13a) is reported at 270 F. 2d 817. The petition for rehearing was denied by an Order dated November 25, 1959 (R. 167).

JURISDICTION

The Judgment of the Court of Appeals reversing the District Court and entering Judgment against petitioner, was entered on October 14, 1959. The Order of the Court of Appeals denying rehearing was entered on November 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Court of Appeals in reversing the District Court has construed a standard covenant of contract of bailment between petitioner and the United States, expressing the common law obligation of the bailee to exercise ordinary care, so as to impose an absolute or insuror's liability on petitioner. The questions presented therefore are:

1. Whether under a contract between the United States and one of its citizens an insuror's absolute liability may be implied from a standard contract provision, which provision,—if the contract had been one between private citizens,—would clearly express and

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"R" refers to the certified copy of the transcript of record of the U.S. Court of Appeals for the Fifth Circuit.

impose only the bailee's (common law) ordinary caretaker's liability;

2. Whether a standard provision of a Government contract of bailment shall in the future be interpreted to impose absolute liability on bailees of government property, where the same and similar provisions consistently have been interpreted by this Court and the Federal Appellate Courts of other circuits, to impose only the ordinary caretaker's liability;

3. Whether the majority of the three judge panel of the United States Court of Appeals for the Fifth Circuit, by a novel and unusual interpretation of a standard clause of Government contract, and in rendering a judgment depriving Petitioner of property without due process of law, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision in accordance with Rule 19(1)(b) of this Court.

STATEMENT

Petitioner Seaboard leased certain used equipment from the United States under a Standard Lease Agreement, prepared by the Government and dated December 14, 1951. This contract of bailment contained a standard provision, setting out the bailee's common law caretaker's obligations as follows:

> "9. The hirer covenants and agrees to use the said machines in a careful and prudent manner during the term hereof, to keep and maintain the same in a good state of condition and repair, to replace and/or repair any and all damage thereto to the extent that upon the termination of this lease all of said machines shall be returned to the owner in as good condition as when the hirer

received the same saving only ordinary wear and tear, that is, deterioration resulting from normal use." (R. 17

The equipment lease contained no other provisions describing, enlarging, limiting or otherwise bearing on the bailee's liability to the bailor for the property bailed nor did it require the bailee to take out any insurance to cover either the property or any liability of the bailee for loss or damage to it.

The equipment was lost and destroyed in a fire which was not due to either fault or negligence of the bailee.

Petitioner purchased and paid for three fire insurance policies in the total amount of $265,383.10 covering various personal property. These policies insured Seaboard only, and contained the following provisions:

1. "This policy covers Seaboard on Contractor's equipment, the property of the Assured, or held by them in trust, or on memorandum or on consignment, or belonging to, others and for which the Assured may be liable in the event of loss." (R. 19)

One of the three policies covered Seaboard with regard to the equipment leased under the agreement of December 14, 1951 insuring its liability for, as well as any other insurable interest in, the property (i.e., improvements and repairs made by Seaboard). The face value of this latter policy was $68,374.80.

On August 23, 1953 Seaboard sued the insurance companies under all three policies, seeking a total recovery of $193,374.80, plus costs and attorneys fees, (an item recoverable under Florida law). On January 4, 1954, the United States was granted leave to

intervene in the case. On January 6, 1954, seven months before the United States filed its complaint pursuant to the order granting it leave to do so, Seaboard and the insurance companies agreed to an overall settlement on all three policies. The amount agreed on was $150,000, which amount of course covered Seaboard's own loss in connection with the bailed equipment. As a condition precedent to the payment to Seaboard of any part of the total settlement agreed on, petitioner had to escrow the sum of $67,488.30, the entire face amount of the policy in suit pending the outcome of its litigation with the United States, although only a small amount of the over-all settlement was attributable to this particular policy. This was done to protect the insurance company against any possible claim (directly against it) by the United States in connection with the loss of equipment under the one of the three policies which insured Seaboard's liability (if any) to the United States for the loss of the leased equipment.[2]

Seven months after the settlement of July 4, 1954, the United States, as intervenor, filed a complaint against Seaboard claiming $181,210 as the value of the destroyed equipment and alleging that Seaboard was absolutely liable for the property and for its full value under the above quoted provision 9 of the agreement. With the consent of both Seaboard and the United

[2] As pointed out above, this policy was not required by the lease agreement between Seaboard and the United States nor did the Government have any knowledge of the insurance policy until after the fire loss. But the face amount of the policy (regardless of the fractional amount paid to Seaboard) was the maximum the United States could have claimed against the Insurance Company under any possible theory of law.

States the original complaint was dismissed as to the insurance companies.

Both parties thereafter cross-moved for summary judgment. On October 28, 1957, the United States District Court for the Northern District of Florida granted Seaboard's motion for summary judgment and dismissed the complaint of the United States. The United States appealed and on October 14, 1959 the Circuit Court of Appeals for the Fifth Circuit reversed the District Court and remanded the case for the entry of judgment in favor of the United States for the amount of $67,488.30, the money which Seaboard had escrowed in accordance with its settlement agreement with the insurance company. The Court of Appeals (expressly finding neither fault nor negligence on Seaboard's part) held that the above quoted provision 9 imposed absolute liability for any loss on Seaboard. For reasons unstated, the Court of Appeals awarded judgment to the United States in the amount of the escrowed funds only, rather than in the amount claimed by the Government to be the value of the lost property.

District Court Judge Simpson, part of the Appellate panel by designation, wrote a dissenting opinion and reiterated his dissent in the order denying rehearing.

The majority held that Petitioner had absolute liability under the above quoted provision 9 of the lease contract between the United States and Seaboard. It relied solely (but mistakenly) on the 1902 decision of this Court in *Sun Printing & Publishing Co. Assoc. v. Moore*, 183 U.S. 642, 22 S. Ct. 240 (1902) which decision we submit does not support but is completely in conflict with the Appellate Court's holding.

REASONS FOR GRANTING THE WRIT

1. *Importance.*

While this case does not involve a matter of immediate national importance, nor crucial interpretation of a current statute, it is respectfully submitted that it may well have greater relative importance and more far-reaching consequences than most cases for which a writ is sought.

The case involves a province of the law which on a day-to-day basis affects almost the entire American economy. It is impossible to estimate how many millions of leases and contracts of bailment of personal property are now in existence or will be entered within a reasonably foreseeable time. A considerable percentage of this vast area of business relationships will come within the jurisdiction of the Federal courts and precedent established by an Appellate Federal Court will also be given great weight in State Courts, particularly in its jurisdictional area.

The decision below, unless reversed, unsettles an area of the law that has been universally settled for many decades. It is hardly necessary to cite authorities for the proposition that a contract provision requiring the bailee to return property "in as good condition as he received it in; ordinary wear and tear excepted", simply expresses the common law caretaker obligation. This has been the general law; it has also been the Federal contract law, to the extent that precedent can be distilled from the Federal decisions over a period of a hundred years.

Most of these appellate decisions are now decades old and the decision of the Court of Appeals for the Fifth Circuit in this case is the only current appellate

decision on this subject. It rends the fabric of the law where it has so securely rested. Unless reversed, it offers precedent, not only for overthrowing established law, but for extensive litigation not heretofore contemplated. It may not only disturb the equanimity of business relationships based on principles which seemed established to negotiating parties in millions of similar and preceding transactions, but, as a reading of the majority opinion makes evident, it will encourage specious interpretation and torture of ordinary and plain contractual language.

2. *Importance in the Interpretation of Standard Government Contracts.*

If upheld, the decision below may become precedent for a distinction between Government Contracts and contracts between private citizens.

Relying on *Priebe Sons, Inc.* v. *United States*, 332 U.S. 407, the Appellate Court expressly holds that its decision is one involving the "construction of government contracts" (R. 144, App. p. 10a). To impose standards of liability in, or to apply standards of construction to contracts between the United States and its citizens, which are different from those applied in and to contracts between private citizens, is, of course, in direct violation of this Court's holding in *Lynch* v. *United States*, 292 U.S. 571, 54 S. Ct. 840:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (at p. 843 (579)).

And, precisely *because* construction of a government contract is involved, sound and consistent construction

of one of its standard clauses, which clause will be used or imposed by the Government again and again, is of utmost national importance. Cf. *United States v. Wunderlich, et al.*, 72 S. Ct. 154, 342 U.S. 98 (1951).

The relative importance of this case is increased by the fact that the majority opinion, in overturning the established law and in opening this new Pandora's Box, relied exclusively on this Court's decision in *Sun Printing & Publishing Co. Assoc. v. Moore*, supra. The *Sun* case, it is submitted has been appropriated as precedent below, in clear disregard of the principles of law enunciated therein. It is in fact, in complete conflict with the decision below; as we shall show at p. 12, infra.

3. *Conflict with decisions of other circuits and the decisions of this Court.*

It is respectfully submitted that the entire body of Federal authority, in every Circuit and in this Court, has consistently and unequivocally upheld the proposition of law that a bailee has only a care-taker obligation unless he expressly and clearly, in language "fairly permitting of no other interpretation", agrees to enlarge his responsibility to include assumption of the risk of destruction without his fault or negligence. We cite in support of this proposition the following decisions:

> *Sturm v. Boker*, 150 U.S. 312, 14 S. Ct. 99 (1893); *Sun Printing & Publishing Co. Assoc. v. Moore*, 183 U.S. 642, 22 S. Ct. 240 (1902); *Mulvaney v. King Paint Mfg. Co.*, 256 F. 612 (C.A. 2, 1919); *Berwind White Coal Co. v. United States*, 15 F. 2d 366 (C.A. 2, 1926); *Cary-Davis Tug & Barge Co. v. Fox*, 22 F. 2d 64 (C.A. 9, 1927);

Cogles Towing Co. v. *American Const. & Dr. Co.*, 27 F. 2d 622 (D.C., W.D.N.Y. 1928); *Shamrock Towing Co.* v. *City of N.Y.*, 32 F. 2d 684 (C.A. 3, 1930); *Tomkins Cove Stone Co.* v. *Bleakley Transp. Co.*, 40 F. 2d 249 (C.A. 3, 1930); *W. & A. Smadbeck* v. *Heling Constr. Corp.*, 50 F 2d 99 (C.A. 2, 1931); *Albine Forwarding Co.* v. *Pennsylvania Railroad Co.*, 60 F. 2d 734 (C.A. 2, 1932); *In Re Podolsky*, 115 F. 2d 965 (C.A. 3, 1940); *Banks* v. *Chas. Kurz Co.*, 69 F. Supp. 61 (D.C. E.D. Pa., 1946); *R.F.C.* v. *Peterson Bros.*, 160 F. 2d 124 (C.A. 5, 1947); *Blair* v. *U.S.*, 164 F. 2d 115 (C.A. 5, 1947); *Venice* v. *Frazier Davis Co.*, 87 F. Supp. 475 (D.C., C.Z. 1949); *Hitchell* v. *Alaska Airlines, Inc.*, 96 F. Supp. 339 (D.C., Alaska, 1951).

Analyzing briefly three of the above landmark decisions, we find:

Name of Case	Court	Language of Contract Construed	Holding of the Court
Sturm v. Boker, U.S. Sup. Ct., supra	(1893)	"It is also understood that these goods shall be shipped by you free of any expenses to us, and that, in case they should not find a ready sale, they shall be returned to us free of all charges. "Please attend to the insurance of this lot, and have the amount transferred to us in one policy; also, please acknowledge the receipt of this, stating your acquiescence in above." (p. 101)	"This agreement to return the goods in the event they should not be sold, it is urged, imposes upon him the risk of their destruction before he had an opportunity to sell or dispose of them under or in accordance with the terms of the consignment. We cannot accede to the correctness of this proposition. The destruction of the goods, without fault or negligence on his part, terminated his obligation to make either a return thereof, or pay for their loss. Such a liability could only be imposed upon him by a contract clearly expressing his assumption of the risk of destruction, or his liability for the loss." (p. 105)

Name of Case	Court	Language of Contract Construed	Holding of the Court
Cary Davis Tug & Barge Co. v. Fox et al., supra	(CA9 (1927)	"The whole job will be completed by the contractor and the tug returned to the owners in good condition as it is to-day. Any parts removed by the contractor in order to do this work will be replaced by him. If the contractor by any chance damages the tug in the performance of this work, the damage will be righted by the contractor." (p. 64)	"Nor is there any merit in the contention that the appellees are liable, regardless of negligence, under the terms of the contract. No doubt a bailee may enlarge his liability by contract, but the provision that the tug should be returned in as good condition as it was that day is a familiar one in leases, charter parties, and other contracts, and almost without exception the courts have held that such provisions are simply declaratory of the obligation implied by law." (p. 66)
Shamrock Rowing Co., Inc., v. City of New York, et al.	(CA2 (1929)	"Our scows to be returned to us as per incoming survey; that is, to be returned to us in same condition as when received, ordinary wear and use excepted." (p. 686)	"The scow was to be returned in the same condition as when received, ordinary wear and tear excepted. A covenant to insure is not implied, and can only be imposed where it is found in an agreement by clear and explicit language." (p. 686)

And even the Court below, in the decision relied on by the District Court, *Reconstruction Finance Corporation* v. *Peterson Bros.*, supra (1947), held:

Language of Contract Construed	Holding of the Court
"On the termination of the rental term of any item of the Equipment, Contractor will return the same in as good condition as when delivered at the job site, usual and ordinary wear and tear excepted." (p. 125)	"A great deal has been written on the subject of the enlargement by special contract of the common law liability of a bailee, and there is a difference of opinion as to what form of words will suffice. It will serve no useful purpose to discuss the authorities here. It is sufficient to say, *that* while some cases have held that the use of language such as that relied on by appellant will enlarge the common law liability of bailee, the great weight of authority is to the effect that such a clause merely sets expressly out what a common law bailment implies, and does not add anything to it. The authorities cited in the margin show that this is the rule not only in Texas but generally. If, therefore, the judgment had been predicated not upon appellant's negligence but upon its absolute liability, it would have to be reversed." (p. 126)

Similarly, in *Blair* v. *United States*, supra, the Court below specifically held, that only "by special provision" the bailee's caretaker liability could be enlarged: This "special provision" in Blair read:

> "'Section 3. Contractor's Responsibility. The Contractor *shall be responsible for* all buildings, equipment and appurtenances to be moved and re-erected, including *any loss*, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project.'" (at p. 117) (Emphasis supplied).

Conflict of decision, we submit, with the decisions of this Court, and those of the different circuits, and also with earlier decisions of the Court of Appeals for the Fifth Circuit, could hardly be more clearly shown.

The majority below rest their decision squarely on this Court's Opinion in *San Printing and Publishing Co. Assoc.* v. *Moore*, *supra*. It is submitted that such reliance is mistaken, because in holding that there was absolute liability in *San*, this Court clearly and expressly based its decision on two "special provisions of the contract" additional to, and other than, the "return in good condition" clause. Here they are:

> "The hirer shall be *liable and responsible for any and all loss* and damage to hull, machinery, equipment, tackle, spars, furniture, or the like." (footnote, p. 242; emphasis supplied).

and

> "... the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00), to *secure any and all losses* and damages which may occur to said boat or its belongings, which may *be sus-*

tained by the owner by reason of such loss or damage *and* by reason of the breach of any of the terms or conditions of this contract." (ibid.) (Emphasis supplied).

The Court did not rely on the "repair and return" clause,[3] but specifically based its holding on the *additional* "further provision" holding the bailee liable for "any and all loss" *and* the additional provision for the insurance bond, by which

> "... having provided for all repairs, having stipulated absolutely for the return of the vessel in full repair, having put the risk of any and all loss on the hirer, the contract then in express terms fixes the value of the vessel, and makes provision for security to protect against any and all loss or damage sustained by a failure of the hirer to fulfil each and all of the positive obligations which the contract imposed." (p. 246)

In *Sun* there was a special and independent undertaking to be responsible for "all loss". A second additional "special provision" required bailee to furnish a substantial indemnity bond, expressly to secure the express agreement to assume absolute liability for *all* loss,—and also (and clearly separated from the former by the word "AND") to secure against the breach of any of the other terms and conditions of the contract (as for instance the covenant to keep in repair).

[3] "That the hirer during the continuance of this agreement shall be at all times, and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats, and the like, in repair ..." (ibid.)

This Court's decision in *Sun* does not even inferentially suggest that absolute liability in *Sun* was, (or should be thereafter) imposed upon a bailee by anything less than a clear and "special provision" expressing such assumption of liability in unmistakable language.

Thus, the decision of the Court of Appeals in this case is in direct conflict with those of many of the Circuits and with the law as settled by this Court. This conflict is aggravated, because these principles have been so long established that the pertinent decisions of this Court are decisions of some 60 years ago. In the natural course of events, therefore, unless this Court re-affirms and re-asserts its previous holdings by reversing the Court of Appeals for the Fifth Circuit, it must be expected that this Court's decisions will be ignored and eroded by preference for the shiny new precedent established by the decision below.

4. *The errors of the Court below require the exercise of this Court's power of supervision.*

It is submitted that the decision of the majority of the court below, arrived at by strained interpretation of the contract language and by lifting from the context of provision 9 a few selected words, is contrary to all applicable principles of law and contrary to accepted standards of judicial interpretation of contractual language. By awarding to the Government Petitioner's funds, placed in escrow under an extraneous agreement (to protect the Insurance Company and not the Government), and consisting to a small extent only of funds in any way connected with

the loss of the equipment,[4] the Court below deprived petitioner of its property without due process of law.

For, the Court below imposed absolute liability upon petitioner bailee on the strength of a contract provision which, as the opinion of dissenting Judge Simpson pointed out, "was the quintessence of the language which normally expresses the mere caretaker obligation of the ordinary bailee". Upon termination of the lease the property was to be returned in good condition, save normal wear and tear. As part of the same sentence, there appears language, (perhaps superfluously) delineating the common law duties of the bailee, to the effect that in order to thus return the property, the bailee was expected to use prudence and maintain the property in good condition and repair any damage. It was this excess verbiage at which the majority pulled and tugged and which it finally dissected, lifting out of the context of a single sentence (almost 10 times larger than the words extracted) the phrase "to replace and or repair any and all damage thereto". On this phrase alone the decision rests; there is no additional provision in the lease bearing on liability, no bond as in *Sun*.[5]

The majority also was very inconsistent in their reasoning. As the dissenting Judge pointed out, the

[4] The settlement agreement of January 6, 1954 between Seaboard and the Fireman's Fund Insurance Company specifically states that " the sum paid by the Company hereunder is paid in overall settlement of the claims under all three policies without apportionment as to any of them". Seaboard's accountants determined that its recovery under the equipment policy was approximately $12,000.00.

[5] The insurance provisions of paragraph 10 of the lease applied clearly to liability to third persons only and were not relied on by the Court. The bond required under paragraph 16 of the lease was clearly and exclusively conditioned on the payment of rent and was relied on neither by Respondent nor the Court below.

insurance policy protecting the bailee's own interest and actual liability was extraneous to the issues in this case. It would have been so, even if the bailee had obtained a "windfall", which it did not.* The Court of Appeals first found that the bailee had "assumed" absolute liability for all the property and then, by some sleight of mind, proceeded to find (without any regard to the value of the property lost, alleged or proven) that the bailee was liable only to the extent of the *face value* of (not the amount recovered under) an insurance policy which Petitioner took out to protect its own liability.

In reversing the District Court, the majority of the Appellate Court molded the facts and the law to "fit" the decision. In so doing, the court below "departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision." (Rule 19(1)(b)).

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted.

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February 19, 1960

* There was no theory of trust, express or implied, or "third party beneficiary" involved, pleaded or relied on by the Court.

APPENDIX

APPENDIX A

SEABOARD MACHINERY CORPORATION, *Plaintiff*,

v.

FIREMAN'S FUND INSURANCE COMPANY, *Defendant*,

UNITED STATES OF AMERICA, *Intervenor-Plaintiff*.

Civ. A. No. 426.

United States District Court

N. D. Florida,

Tallahassee Division.

Oct. 28, 1957.

DE VANE, Chief Judge.

This is the third and last of the series of cases in which the United States is attempting to capture the proceeds of insurance carried by plaintiff on certain property owned by the United States and leased by it to plaintiff, which was destroyed in a fire at Wainwright Shipyard, Panama City, Florida, on December 22, 1952. The other cases involved buildings and personal property leased to plaintiff by General Services Administration. See Seaboard Machinery Corporation v. Hanover Fire Insurance Company, D.C., 149 F. Supp. 362.

This case is before the Court on a motion for summary judgment filed by each party. The facts are in no way in controversy insofar as they pertain to the specific limited question of plaintiff's liability to intervenor-plaintiff raised by the pleadings.

The property here involved was leased to plaintiff by the Maritime Commission and consisted entirely of personal property.

The pertinent provisions of the lease agreement between plaintiff and the Maritime Commission bearing upon the issue involved in this case are set out below:

"9. The Hirer covenants and agrees to use the said machines in a careful and prudent manner during the term hereof, to keep and maintain the same in a good state of condition and repair, to replace and or repair any and all damage thereto to the extent that upon the termination of this lease all of said machines shall be returned to the owner in as good condition as when the Hirer received the same saving only ordinary wear and tear, that is, deterioration resulting from normal use.

"10. The Hirer covenants and agrees to indemnify and save harmless the Owner from and against any and all claims, suits, actions, damages, penalties, judgments, trespasses, omissions, and any and all causes of action of whatsoever nature during the term hereof arising directly or indirectly out of or because of or on account of this lease, including personal injury, loss of life, loss of or damage to property, both real and personal, or any other matter, thing, or cause in connection with this lease.

"11. The Hirer covenants and agrees that it shall use said machine tools only at its plant at Panama City, Florida, and then only in performance of its several subcontracts for the fabrication of Hatch Covers and other marine equipment for vessels to be constructed for the United States Government.

"16. The Hirer covenants and agrees simultaneously with its execution and delivery of this lease to furnish to the Owner, at the Hirer's expense, a bond in the sum of $10,000, approved as to form and substance by, and with surety or sureties satisfactory to the Maritime Administration of the Department of Commerce, the condition of said bond being that the Hirer shall, during the term of this lease, duly pay to the Owner the rent above specified upon the respective dates therein appointed for payment thereof and shall, during the term of this lease, duly observe and perform

all and singular the covenants, agreements and conditions herein contained to be observed and performed by the Hirer.' The original of such bond shall be delivered to the Division of Ports and Facilities, Maritime Administration, Department of Commerce, Washington 25, D. C."

No claim is made by intervenor-plaintiff against plaintiff charging a violation of any of the above enumerated provisions other than Paragraph 9. It is intervenor-plaintiff's contention in this case that Paragraph 9 of this lease agreement made plaintiff an insurer of the property under lease, and that intervenor-plaintiff is entitled to recover from plaintiff the full cost of replacement of all the property destroyed in the total sum of $181,200. In this connection it should be noted that in this case the Maritime Commission made no requirement of plaintiff that it insure said property for this or any other amount. Plaintiff was not required to carry any insurance on the property for the use and benefit of the Maritime Commission.

There is no question in the case that the property was completely destroyed by fire. There is no issue of negligence charged against plaintiff, and the only question presented for this Court's decision is whether Paragraph 9 quoted above makes plaintiff an insurer of the property involved and liable, as here claimed by intervenor-plaintiff, for the full replacement value of the property destroyed by the fire.

The pleadings in the case show and the parties agree, that plaintiff had an insurable interest in the property in question, and that it insured its interest therein for the sum of $68,374.80 and that the insurance company placed in escrow in full payment and satisfaction of plaintiff's claim the sum of $67,488.39. This escrow agreement was made necessary by the intervenor-plaintiff notifying the insurance company of its claim against plaintiff, and the money was deposited at the direction of this Court in escrow prior

to the filing of the intervenor petition in this case and remains and still is held in escrow pending the outcome of this controversy.

Counsel for intervenor-plaintiff conceded on oral argument and on brief in this case that under the general rule the common-law obligation of a bailee is to use due care, and is liable to the bailor for damage to or loss of the property only in case of its failure so to do. In this case, however, intervenor-plaintiff vigorously insists that the contract here in question imposed absolute liability for the safe return of the property in question, and upon failure to make such return, bailee became liable to the bailor for the full replacement cost, or at least the full market value of the property.

In making this contention, counsel for intervenor-plaintiff relies upon 6 Am. Jur., Sec. 239 and cases there cited. There are cases to be found in other jurisdictions supporting the position of intervenor-plaintiff herein, but in the opinion of this Court this case is controlled by the opinion of the Court of Appeals, Fifth Circuit, in Reconstruction Finance Corporation v. Peterson Brothers (Peterson Brothers v. Arthur G. McKee & Company) 160 F. 2d 124, and by the decisions of the Supreme Court of Florida in the following cases: Williamson v. Phillipoff, 66 Fla. 549, 64 So. 269, 52 L.R.A., N.S., 412; Coombs v. Rice, 64 Fla. 202, 59 So. 958. Many other cases from other jurisdictions could be cited, but as Judge Hutcheson said in Reconstruction Finance Corporation v. Peterson Brothers, supra (160 F. 2d at page 126):

> "A great deal has been written on the subject of the enlargement by special contract of the common law liability of a bailee, and there is a difference of opinion as to what form of words will suffice. It will serve no useful purpose to discuss the authorities here. It is sufficient to say that while some cases have held that the use of language such as that relied on by appellant will enlarge the common law liability of bailee, the

great weight of authority is to the effect that such a clause merely sets expressly out what a common law bailment implies, and does not add anything to it."

In this connection, it is of interest to note the similarity in the bailment contract involved in Reconstruction Finance Corporation case and that involved here.

While making it no issue by the pleadings in the case, counsel for the intervenor-plaintiff in their final argument in this case suggested that where insurance is effected by the bailee, either voluntarily or pursuant to an agreement expressed or implied, that the bailee is answerable to the owner of the goods from the proceeds in case of loss, the benefit of which may be claimed by the bailor to the extent of his insurable interest. Neither the Court of Appeals of the Fifth Circuit of the Supreme Court of Florida have expanded the liability of a bailee to such extent and this Court is unwilling to do so here.

Under the decision of the Court of Appeals, Fifth Circuit, in Reconstruction Finance Corporation v. Peterson, supra, a conditional liability existed on the part of plaintiff to the intervenor-plaintiff, which plaintiff had the right to protect, and to now rob it of the benefits of its wise decision in the matter is not legally authorized here; moreover, as pointed out above, plaintiff had an insurable interest in the property beyond its conditional liability. Had intervenor-plaintiff desired insurance upon this property for its own protection, it could have by its lease agreement required plaintiff to carry such insurance to the maximum limit of insurable value under state law as the General Services Administration did in the other two cases refefred to above. Seaboard Machinery Corp. v. Hanover Fire Ins. Co., D.C., 149 F. Supp. 362.

In conformity with this memorandum decision an order will be entered herein granting plaintiff's motion for summary judgment.

APPENDIX B

UNITED STATES OF AMERICA, *Intervenor, Appellant,*

v.

SEABOARD MACHINERY CORPORATION, *Appellee.*

No. 17238.

United States Court of Appeals

Fifth Circuit.

Oct. 14, 1959.

Rehearing Denied Nov. 25, 1959.

Before RIVES, Chief Judge; TUTTLE, Circuit Judge, and SIMPSON, District Judge.

TUTTLE, Circuit Judge.

On December 14, 1951 Seaboard Machinery Corporation and the United States entered into a contract under which the United States leased to Seaboard specified equipment to be used at the shipyard of Seaboard in its plant at Panama City, Florida. This contract was denominated an "Equipment Lease." It provided for an annual rental payment of $9,074.79, later increased by $421.75 per year for additional equipment.

Included in the terms of the Equipment Lease was the following:

> "9. The Hirer covenants and agrees to use the said machines in a careful and prudent manner during the term hereof, to keep and maintain the same in a good state of condition and repair, to replace and or repair any and all damage thereto to the extent that upon the termination of this lease all of said machine shall be returned to the owned in as good condition as when the Hirer received the same saving only ordinary wear and tear, that is, deterioration resulting from normal use."

During an extension of the lease, on December 22, 1952, the shipyard and a substantial portion of its contents were destroyed by fire. It must be taken on this record that such destruction was without fault or negligence on Seaboard's part.

Seaboard had obtained three "special floater policies" which insured Seaboard (and only Seaboard) against loss including fire, of three specific lots of property. One of these policies, No. SFP33771, in the face amount of $100,000 covered movable equipment owned by Seaboard; another, No. SFP33777, in the face amount of $97,008.30 covered movable equipment owned by the United States and leased to Seaboard through General Services Administration. The third policy, No. SFP33799, in the face amount of $68,374.80 covered equipment which was owned by the United States and leased to Seaboard through the Maritime Administration. This was the property whose loss gives rise to this litigation. It was in face amount equal to the original acquisition cost of the equipment to the United States.

Seaboard filed suit against the insurance company on the three policies. The United States Government intervened as a claimant to part of the proceeds expected to be recovered by Seaboard from the insurance company. A settlement was worked out between Seaboard and the insurance company, under the terms of which Seaboard was to receive $150,000 on all three policies. Since the admitted loss under policy No. SFP 33799 was $67,488.30, this amount of the total settlement was placed in escrow with a Tallahassee bank to protect the insurance company against any claim to all or part of this sum by the United States, acting through the Maritime Administration. Seaboard's suit against the insurance company was then dismissed, leaving the litigation pending between Seaboard and the United States.

In the claim filed by the United States it was asserted that under the provisions of Paragraph 9, quoted above,

and Paragraph 10,[1] Seaboard became absolutely liable to respond to the Government upon its failure to replace the burned equipment. It was on this issue as to the meaning of these provisions of the contract that the case was tried by the district court after both parties filed affidavits supporting their respective motions for summary judgment. Both affidavits undertook to state the view of the respective affiants as to the meaning of these terms. There was this before the court only the problem of construing the langauge of the written contract.

In a memorandum opinion the trial court examined the provisions in question, compared them with the bailment contract before this Court in R.F.C. v. Peterson Bros., 5 Cir., 160 F. 2d 124, and concluded that the obligation of Seaboard was merely that of an ordinary bailee for hire and was not enlarged by the requirements of Paragraph 9 that Seaboard "replace and or repair any and all damage" to the leased property.

A careful consideration of the differences between the bailment agreement before the Court in the Peterson case and that which is before us here for construction, constrains us to disagree with the decision of the trial court. Because of our views on this requirement of the contract it is not necessary for us to discuss the further contention of the Government that Seaboard's insuring of the leased property was at least to some extent for the benefit of the

[1] Paragraph 10 is as follows:

"10. The Hirer covenants and agrees to indemnify and save harmless the Owner from and against any and all claims, suits, actions, damages, penalties, judgments, trespasses, omissions, and any and all causes of action of whatsoever nature during the term hereof arising directly or indirectly out of or because of or on account of this lease, including personal injury, loss of life, loss of or damage to property, both real and personal, or any other matter, thing, or cause in connection with this lease."

United States, and that Seaboard held the proceeds in trust for the Maritime Commission.

The language in the Peterson Bros. case, which it was contended created an absolutely liability on the part of a bailee to make good for the loss or destruction of leased equipment where there was no negligence of other fault on the part of the bailee, is as follows:

> "On the termination of the rental term of any items of the Equipment, Contractor will return the same in as good condition as when delivered at the job site, usual and ordinary wear and tear excepted." 160 F. 2d 124, 125.

It will quickly be noticed that the language in the present Equipment Lease is quite different. Here Seaboard obligated itself not only to return the equipment to the owner in as good condition as when it received the same, saving only ordinary wear and tear, but it stated this in terms which make it unmistakably clear that it assumed the responsibility of making good any loss or damage to the equipment. It provided not only that "the Hirer covenants and agrees to use the said machines in a careful and prudent manner during the term thereof," which would have been sufficient to state the common law liability of a bailee, but it further agreed:

> "to keep and maintain the same in a good state of condition and repair."

And then furthermore, which is most significant:

> "to replace and or repair any and all damage thereto *to the extent that* upon the termination of this lease all of said machines shall be returned to the Owner in as good condition as when the Hirer received the same, saving only ordinary wear and tear." (Emphasis added.)

The provision went even further significantly adding a description of ordinary wear and tear as:

> "that is deterioration resulting from normal use."

"We think it quite clear that general contract law, to the extent that it can be distilled from the federal decisions, is the proper law to apply rather than the law of any particular state. It does not appear that any different rule would be applicable and appellee does not here argue for a rule of law to any particular jurisdiction. In Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411, 68 S. Ct. 123, 125, 92 L. Ed. 32, the Court stated:

> "It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law."

In Sun Printing & Publishing Ass'n v. Moore, 183 U.S. 642, 22 S. Ct. 240, 242, 46 L. Ed. 366, the United States Supreme Court had for consideration a contract of bailment under the terms of which one party had leased a yacht for use in connection with newspaper coverage of the Spanish-American War. The yacht was destroyed without negligence of the lessee. Under a contract, some of the terms of which follow:

> "The hirer will * * * keep said yacht in repair and * * * will surrender said yacht with all its gear, furniture, and tackle, at the expiration of this contract to the owner * * * in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," and
>
> "The hirer shall be liable and responsible for any and all loss * * * to hull, machinery, equipment, tackle, spars, furniture, or the like," and again
>
> "The hirer during the continuance of this agreement shall at all times, and at his own cost and expense,

keep the said yacht, its hull, machinery, tackle, spars, furniture, gears, boats, and the like, in repair."

the Court stated:

> "It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it has been lost or destroyed without his fault. Such is the universal principle."

The Court then stated, however:

> "but it is equally true that where by a contract of bailment the hirer has, either expressly or by fair implication, assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling, and must be enforced according to its terms."

citing Sturm v. Boker, 150 U.S. 312, 14 S. Ct. 99, and Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762.

Considering the language of the contract above quoted, the Court then said:

> "Pausing for a moment to consider the foregoing stipulations, it is difficult to conceive how language could more aptly express the absolute obligation, not only to repair and keep in good order to the end of the hiring and to return, but, moreover, to be responsible for any and all loss and damage to the vessel, her fixtures and appointments. These stipulations seem to us to leave no doubt of the absolute liability to return; in other words, of the putting of the risk of damage or loss of the vessel upon the hirer." 183 U.S. 642, 656, 22 S. Ct. 240, 246.

Other cases relating to the enlargement of the liability of a bailee by agreement are collected in Am. Jur. Bail-

ments, § 183, pp. 30 et seq., and in 8 C.J.S. Bailments § 26d, pp. 267 et seq.

It is clear that the language used in the contract before the Court in the Peterson Bros. case, supra, was simply a restatement of the common law liability of a bailee for hire. It is equally clear that the language in the Equipment Lease before us is intended to enlarge that liability. As is so cogently stated in Sun Printing & Publishing Ass'n v. Moore, supra, the Courts must give effect to such intent when clearly manifest in the agreement.

We conclude that the Equipment Lease obligated Seaboard to stand responsible for the leased machinery or its value in the event of its destruction by fire. Seaboard, having an insurable interest, could, as it did, protect itself completely against loss in such eventuality by taking insurance to the full value of the rented equipment. It is only required now to pay over to the Government the proceeds of such insurance.

The judgment is reversed and the cause remanded for the entry of judgment in favor of the United States for the amount of insurance funds held in escrow.

SIMPSON, District Judge (dissenting):

Despite my strong respect for the views of the majority, I reach an opposite view as to the meaning of the language of the critical Paragraph 9 of the Equipment Lease. I read that language as simply expressing the caretaker obligation of an ordinary bailee, to maintain and repair the leased equipment and to return it to the bailor in good condition at the end of the bailment.

It is by no means unusual for Government lawyers in phrasing contracts (or any other documents) to use many words where a few would suffice. This, it seems to me, is all that occurred here. The obligation under Paragraph 9, reduced to its essence and stripped of its excess verbiage, I view as precisely the obligation undertaken by the bail-

ment contract before this Court in R.E.C. v. Peterson Bros., 5 Cir., 160 F. 2d 124.

The fact that the bailee, Seaboard, for its own benefit, insured its own interest in the leased equipment, and collected the proceeds of this insurance, is completely extraneous to a determination of Seaboard's contractual obligation. The suit, as framed, was not a dispute over proceeds of the insurance policy; it was an attempt to construe the contractual liability as that of an insurer, one of absolute liability, regardless of fault. Such liability is neither expressed nor fairly implied by the language under scrutiny.

I would affirm the District Judge's holding that under the Peterson case, Paragraph 9 "merely sets expressly out what a common law bailment implies, and does not add anything to it." 160 F. 2d at page 126.

With deference, therefore, I dissent.

Rehearing denied: Simpson, District Judge, dissenting.